(2) A list of instructors and the courses they are qualified to teach.

(3) The location where the instruction will take place.

(4) A description of the teaching methods and the course materials which are to be used in the training.

(5) A copy of the qualification examination and, in the case of annual retraining, the evaluation program to be used.

(d) The operator shall furnish to the representative of the miners a copy of the training and qualification program 14 days prior to its submission to the District Manager. Where a miner's representative is not designated, a copy of the program shall be posted on the mine bulletin board 14 days prior to its submission to the District Manager. Written comments received by the operator from miners or their representatives shall be submitted to the District Manager. Miners or their representatives may submit written comments directly to the District Manager.

(e) Revisions to the program may be initiated by the mine operator or the District Manager to gain approval, retain approval, or to address training needs, changes or modifications, and new technology.

(f) In the event the District Manager disapproves a program or a revision of the program, the District Manager shall notify the mine operator in writing of—

(1) The specific changes or items of deficiency;

(2) The action necessary to effect the changes or bring the disapproved program or modification into compliance; and

(3) The deadline for the completion of the revision.

(g) Failure of a qualified diesel mechanic to complete required retraining within 3 years of initial training and qualification or the most recent annual retraining shall result in a lapse of qualification. A mechanic whose qualification lapses shall complete initial training and qualification to regain qualification.

(h) The District Manager may revoke a diesel mechanic's qualifications for cause, including intentional violation of the requirements of part 75 or the intentional defeat of any safety or health device. Before any revocation becomes effective, the District Manager shall send written reasons for revocation to the diesel mechanic, who shall be given ten calendar days to respond. Unless otherwise determined by the District Manager, revocation shall become effective ten days from notification to the diesel mechanic. A decision by the District Manager, to revoke a diesel mechanic's qualification, may be appealed by the diesel mechanic to the Administrator for Coal Mine Safety and Health, MSHA, 4015 Wilson Boulevard, Arlington, Virginia 22203. Such an appeal shall be submitted to the Administrator within 30 days from the effective date of the revocation. Upon revocation of a diesel mechanic's qualification, the District Manager shall immediately notify the appropriate mine operator.

(i) The operator shall maintain a copy of the MSHA approved training and qualification program available at the mine site. This copy shall contain a current instructor list.

(j) The operator shall maintain available for inspection, at the mine site, the names of all persons qualified as underground diesel mechanics, dates of qualification, and the date of the last annual retraining.

§ 75.1917 Operating speed of diesel-powered equipment.

(a) All roadways where diesel-powered equipment is operated shall be maintained as free as practicable from bottom irregularities, debris and wet or muddy conditions that affect control of the equipment.

(b) Diesel-powered equipment operating speeds shall be consistent with conditions of roadways, grades, clearances, visibility and traffic and type of equipment used.

(c) Mobile diesel-powered equipment operators shall have full control of the equipment while it is in motion.

(d) Traffic rules, including speed, signals and warning signs, shall be standardized at each mine and posted.

[FR Doc. 89-23170 Filed 10-3-89; 8:45 am]
BILLING CODE 4510-43-M

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30 CFR Part 7

RIN 1219-AA27

Approval Requirements for Diesel-Powered Machines

AGENCY: Mine Safety and Health Administration, Labor.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: The Mine Safety and Health Administration (MSHA) is in the early stages of developing approval requirements for diesel machines to reduce or eliminate fire, explosion, and safety hazards associated with the use of diesel-powered equipment in underground coal mines. The approval requirements that are being developed are based on the recommendations of the Mine Safety and Health Administration Advisory Committee on Standards and Regulations for Diesel-Powered Equipment in Underground Coal Mines (Advisory Committee). Comments and information pertaining to any aspect of the approval requirements are invited. This notice also outlines specific issues on which MSHA is seeking comment and information from the mining community concerning the scope of such approval requirements, their content, and how they would be administered by the Agency.

DATES: All comments and information should be submitted by January 2, 1989.

ADDRESS: Send written comments to the Mine Safety and Health Administration, Office of Standards, Regulations and Variances, Room 631, Ballston Tower No. 3, 4015 Wilson Boulevard, Arlington, Virginia 22203.

FOR FURTHER INFORMATION CONTACT: Patricia W. Silvey, Director, Office of Standards, Regulations and Variances, Mine Safety and Health Administration, telephone (703) 235-1910.

SUPPLEMENTARY INFORMATION: Based on the recommendations of the MSHA Advisory Committee, MSHA has developed proposed approval regulations under 30 CFR part 7 for diesel engines and power packages to be used in diesel-powered equipment. These proposals are found elsewhere in today's **Federal Register**. As part of its discussions, the Advisory Committee raised the issue of what types of features should be included in the machine approval requirements for diesel-powered equipment. A machine would consist of an approved diesel engine and an approved diesel power package along with those features added to the machine to reduce or eliminate fire, explosion, or safety hazards. The Advisory Committee recommended that in addition to approval regulations for diesel engines and power packages, an approval program for self-propelled, diesel powered equipment and portable, attended diesel power equipment should be established. The approval program as recommended by the Committee would be directed to those equipment design features most readily addressed by equipment manufacturers. These features would include the incorporation of an approved engine and power package, and include provisions for fuel systems, exhaust gas dilution systems, fire suppression systems, electrical systems, and braking systems. The approval evaluation would stress the

inter-relationships of all of these systems. Specific features such as a neutral start capability, load locking valves and guarding of moving parts would be addressed. In addition, under the Committee recommendation, the machine design would be evaluated to ensure that provisions have been made for the installation of other devices such as methane monitors and cabs and canopies when appropriate.

The Committee also discussed the applicability of certain safety features currently installed on electric equipment such as headlights for illumination and panic bars for emergency shut-downs which might also be applicable to diesel powered equipment. The Committee recommended that MSHA review all existing approval and use standards for equipment safety features potentially applicable to diesel powered equipment in underground coal mines. Machine related safety features currently are addressed in parts 18, 20, 27, 31, 32, 36, and 75.

Specific Issues Identified for Comment

In this advance notice of proposed rulemaking, MSHA is seeking comments and information on a number of issues. Commenters should provide detailed reasons to support their respective positions based upon particular experience and circumstance. MSHA requests comments on all aspects of diesel machine approval requirements and on the following issues in particular:

General Approach and Scope of MSHA Approval Requirements for Diesel Machines

—Should MSHA approval requirements for diesel machines be promulgated under part 7? If part 7 is not appropriate, how should MSHA administer an approval program for diesel machines?

—Should MSHA establish an approval program which ensures that underground use standards have been met? That is, should MSHA include as part of the machine approval evaluation, machine features required by part 75 such as audible warning systems, presence of reflective material, and safety chains for equipment that is towed, and other features such as emergency de-energization devices (panic bars) and fire suppression systems?

Machine Features

—Which of the following machine features are appropriate to include under approval requirements for diesel machines: fuel systems (including piping, tanks, direction of exhaust flow); neutral start capability; emergency de-energization devices (panic bars); braking systems (including service brakes and automatic emergency parking brakes); operators compartment (including controls and gauges); fire suppression systems; electrical systems, (including all components); exhaust dilution systems; fuel dispensing systems on fuel transportation units; hydraulic and pneumatic systems; load locking valves, and guarding of moving parts?

—Should MSHA provide for certain redundant requirement in both the approval evaluation and part 75 to allow an operator to make changes to a machine pursuant to Part 75 without a need for the operator to apply for a field modification?

Economic Impact

—Some machines currently manufactured and in use underground already have some of the features referred to previously in this ANPRM. What percent of machines, by machine type (e.g., self-propelled), has each of the recommended features?

—Many of the above mentioned features would need to be added to both newly built machines and machines currently in use underground. What specific features are they? How much would these features cost if they were factory installed? How much would these features cost if they were retrofitted to existing equipment?

—What quantitative safety and health related data are available to document the potential benefits of a machine approval? Specifically, what exposure data, incidence rate information and any published studies are available?

Dated: September 26, 1989.

David C. O'Neal,

Assistant Secretary for Mine Safety and Health.

[FR Doc. 89-23169 Filed 10-2-89; 8:45 am]
BILLING CODE 4510-43-M

federal register

Wednesday
October 4, 1989

Part III

Environmental Protection Agency

40 CFR Part 300

National Priorities List for Uncontrolled Hazardous Waste Sites; Final Rules

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 300

[FRL-3655-4]

National Priorities List for Uncontrolled Hazardous Waste Sites—Final Rule Convering Sites Subject to the Subtitle C Corrective Action Authorities of the Resource Conservation and Recovery Act

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency ("EPA") is amending the National Oil and Hazardous Substances Pollution Contingency Plan ("NCP"), 40 CFR part 300, which was promulgated on July 16, 1982, pursuant to section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"). CERCLA has since been amended by the Superfund Amendments and Reauthorization Act of 1986 ("SARA") and is implemented by Executive Order 12580 (52 FR 2923, January 29, 1987). CERCLA requires that the NCP include a list of national priorities among the known releases or threatened releases of hazardous substances, pollutants, or contaminants throughout the United States, and that the list be revised at least annually. The National Priorities List ("NPL"), initially promulgated as Appendix B of the NCP on September 8, 1983 (48 FR 40658), constitutes this list and is being revised today by the addition of 23 sites. Based on a review of public comments, EPA has decided that 13 of these sites, which are subject to the corrective action authorities of Subtitle C of the Resources Conservation and Recovery Act ("RCRA"), meet the listing requirements of the NPL. This rule also adds 5 RCRA sites on which no comments were received, and adds 5 no-comment sites which filed RCRA permit applications as a precaution and are not subject to RCRA corrective action authorities. Finally, today's action removes 27 RCRA sites from the proposed NPL. EPA has reviewed public comments on the removal of these sites and has decided not to place them on the NPL because they are subject to the subtitle C corrective action authorities of RCRA, and do not, at this time, appear to come within the categories of RCRA facilities that EPA considers appropriate for the NPL. Information supporting these actions is contained in the Superfund Public Docket.

Elsewhere in today's Federal Register is another final rule that adds 70 sites, including 11 Federal Facility sites, to the NPL and drops 4 sites from the proposed NPL. These two rules result in a final NPL of 981 sites, 52 of them in the Federal section; 213 sites are proposed to the NPL, 63 of them in the Federal section. Final and proposed sites now total 1,194.

EFFECTIVE DATE: The effective date for this amendment to the NCP shall be November 3, 1989. CERCLA section 305 provides for a legislative veto of regulations promulgated under CERCLA. Although *INS* v. *Chadha*, 462 U.S. 919, 103 S. Ct. 2764 (1983), cast the validity of the legislative veto into question, EPA has transmitted a copy of this regulation to the Secretary of the Senate and the Clerk of the House of Representatives. If any action by Congress calls the effective date of this regulation into question, the Agency will publish a notice of clarification in the Federal Register.

ADDRESSES: Addresses for the Headquarters and Regional dockets follow. For further details on what these dockets contain, see section I of the **"SUPPLEMENTARY INFORMATION"** portion of this preamble.

Tina Maragousis, Headquarters, U.S. EPA CERCLA Docket Office, Waterside Mall, 401 M Street SW., Washington, DC 20460, 202/382-3046

Evo Cunha, Region 1, U.S. EPA Waste Management Records Center, HES-CAN 6, John F. Kennedy Federal Building, Boston, MA 02203, 617/565-3300

U.S. EPA, Region 2, Document Control Center, Superfund Docket, 26 Federal Plaza, 7th Floor, Room 740, New York, NY 10278, Latchmin Serrano, 212/264-5540, Ophelia Brown, 212/264-1154

Diane McCreary, Region 3, U.S. EPA Library, 5th Floor, 841 Chestnut Building, 9th & Chestnut Streets, Philadelphia, PA 19107, 213/597-0580

Gayle Alston, Region 4, U.S. EPA Library, Room G-6, 345 Courtland Street NE., Atlanta, GA 30365, 404/347-4216

Cathy Freeman, Region 5, U.S. EPA, 5HS-12, 230 South Dearborn Street, Chicago, IL 50604, 312/886-6214

Deborah Vaughn-Wright, Region 6, U.S. EPA, 1445 Ross Avenue, Mail Code 6H-MA, Dallas, TX 75202-2733, 214/655-6740

Brenda Ward, Region 7, U.S. EPA Library, 726 Minnesota Avenue, Kansas City, KS 66101, 913/236-2828

Dolores Eddy, Region 8, U.S. EPA Library, 999 18th Street, Suite 500, Denver, CO 80202-2405, 303/293-1444

Linda Sunnen, Region 9, U.S. EPA, Library, 6th Floor, 215 Fremont Street, San Francisco, CA 94105, 415/974-8082

David Bennett, Region 10, U.S. EPA, 9th Floor, 1200 6th Avenue, Mail Stop HW-093, Seattle, WA 98101, 206/442-2103

FOR FURTHER INFORMATION CONTACT: Henry Stevens, Hazardous Site Evaluation Division, Office of Emergency and Remedial Response (0S-230), U.S. Environmental Protection Agency, 401 M Street, SW, Washington, DC, 20460, or the Superfund Hotline, Phone (800) 424-9346 (382-3000 in the Washington, DC, metropolitan area).

SUPPLEMENTARY INFORMATION:

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I. Introduction

Background

In 1980, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. sections 9601-9657 ("CERCLA" or the "Act"), in response to the dangers of uncontrolled or abandoned hazardous waste sites. CERCLA was amended in 1986 by the Superfund Amendments and Reauthorization Act ("SARA"), Public Law No. 99-499, Stat. 1613 *et seq.* To implement CERCLA, the U.S. Environmental Protection Agency ("EPA" or "the Agency") promulgated the revised National Oil and Hazardous Substances Pollution Contingency Plan ("NCP") 40 CFR Part 300, on July 16, 1982 (47 FR 31180) pursuant to CERCLA section 105 and Executive Order 12316 (46 FR 42237, August 20, 1981). The NCP, further revised by EPA on September 16, 1985 (50 FR 37624) and November 20, 1985 (50 FR 47912), sets forth guidelines and procedures needed to respond under CERCLA to releases and threatened releases of hazardous substances, pollutants, or contaminants. On December 21, 1988 (53 FR 51394), EPA proposed revisions to the NCP in response to SARA.

Section 105(a)(8)(A) of CLA, as amended by SARA, requires that the NCP include "criteria for determining priorities among releases or threatened releases throughout the United States for the purpose of taking remedial action and, to the extent practicable taking into account the potential urgency of such action, for the purpose of taking removal action." Removal action involves cleanup or other actions that are taken in response to releases or threats of releases on a short-term or temporary basis (CERCLA section 101(23)).

Remedial action tends to be long-term in nature and involves response actions which are consistent with a permanent remedy for a release (CERCLA section 101(24)). Criteria for determining priorities for possible remedial actions financed by the Trust Fund established under CERCLA are included in the Hazard Ranking System ("HRS"), which EPA promulgated as Appendix A of the NCP (47 FR 31219, July 16, 1982).

On December 23, 1988 (53 FR 51962), EPA proposed revisions to the HRS in response to CERCLA section 105(c), added by SARA. EPA intends to issue the revised HRS as soon as possible. However, until EPA has reviewed public comments and the proposed revisions have been put into effect, EPA will continue to propose and promulgate sites using the current HRS, in accordance with CERCLA section 105(c)(1) and Congressional intent, as explained in 54 FR 13299 (March 31, 1989).

Based in large part on the HRS criterion, and pursuant to section 105(a)(8)(B) of CERCLA, as amended by SARA, EPA prepared a list of national priorities among the known releases or threatened releases of hazardous substances, pollutants, or contaminants througout the United States. The list, which is Appendix B of the NCP, is the National Priorities List ("NPL"). CERCLA section 105(a)(8)(B) also requires that the NPL be revised at least annually. A site can undergo CLA-financed remedial action only after it is placed on the NPL as provided in the NCP at 40 CFR 300.66(c)(2), and 300.68(a).

An original NPL of 406 sites was promulgated on September 8, 1983 (48 FR 40658). The NPL has been expanded since then, most recently on March 31, 1989 (54 FR 13296). The Agency has also published a number of proposed rulemakings to add sites to the NPL most recently a special update of two sites on August 16, 1989 (54 FR 33846).

EPA may delete sites when no further response is appropriate, as provided in the NCP at 40 CFR 300.66(c)(7). To date the Agency has deleted 28 sites from the NPL, most recently on September 22, 1989 (54 FR 38994) when the Cecil Lindsey site, Newport, Arkansas, was deleted.

Of the sites in this rule, 30 were originally proposed in the first four updates to the NPL,[1] prior to publication in 1986 of an expanded policy for listing on the NPL certain categories of sites regulated under the Resource Conservation and Recovery Act ("RCRA") (announced on June 10, 1986 (51 FR 21054) and further amended on June 24, 1988 (53 FR 23978)) (the "NPL/RCRA policy"). The 39 sites were identified as possibly subject to the Subtitle C corrective action authorities of RCRA, and therefore possibly subject to the NPL/RCRA policy. Because the public had not been afforded notice and opportunity to comment on the application of this policy to these sites, the Agency reproposed the sites (13 to be listed, 26 to be dropped) on June 24, 1988 under the amended policy and at the same time solicited comments on the proposed actions (53 FR 23978). Nine RCRA sites proposed in NPL Update #7 (53 FR 23988, June 24, 1988) and one site proposed in Update #8 (54 FR 19526, May 5, 1989) are also being added to the NPL in this final rule; these sites were proposed under the NPL/RCRA policy, but received no comments. In addition, one RCRA site proposed in Update #7 is being dropped in this final rule because of a change in its RCRA status.

EPA has carefully considered all the public comments submitted on the 39 previously proposed RCRA sites, both in response to the original proposal of the sites, as well as in response to the application of the NPL/RCRA policy to the specific sites. The Agency has made some modifications in this final rule in response to those comments. In addition, the Agency is dropping one proposed Update #7 site in response to comments concerning the site's RCRA status.

The Agency has responded to a number of major comments on the policy for listing RCRA sites in this notice. Responses to more site-specific listing policy issues, as well as comments on HRS scores, are presented in the "Support Document for the Revised National Priorities List—Final Rule Covering Sites Subject to the Subtitle C Corrective Action Authorities of the Resource Conservation and Recovery Act, October, 1989" which is a separate document available in the Headquarters and Regional public dockets (see Addresses portion of this notice).

This rule, together with the final rule appearing elsewhere in today's **Federal Register**, results in a final NPL of 981 sites, 52 of them in the Federal section; 213 sites are in proposed status, 63 of them in the Federal section. Final and proposed sites now total 1,194.

EPA includes on the NPL sites at which there are or have been releases or threatened releases of hazardous substances, pollutants, or contaminants. The discussion below may refer to "releases or threatened releases" simply as "releases," or alternatively, as "facilities" or "sites."

Information Available to the Public

The Headquarters and Regional public dockets for the NPL (see **ADDRESSES** portion of this notice) contain documents relating to the scoring and evaluation of sites in this final rule. The dockets are available for viewing "by appointment only" after the appearance of this notice. The hours of operation for the Headquarters docket are from 9:00 a.m. to 4:00 p.m., Monday through Friday excluding Federal holidays. Please contact individual Regional dockets for hours.

The Headquarters docket contains a memorandum-to-the-record describing the RCRA status of the sites, HRS score sheets for each final site, a Documentation Record for each Final site describing the information used to compute the scores, a list of documents referenced in the Documentation Record, comments received, and the Agency's response to those comments (the "Support Document").

Each Regional docket includes all information available in the Headquarters docket for sites in that Region, as well as the actual reference documents, which contain the data upon which EPA principally relied upon in calculating or evaluating the HRS scores for sites in the Region. These reference documents are available only in the Regional dockets. They may be viewed "by appointment only" in the appropriate Regional docket or Superfund Branch office. Requests for copies may be directed to the appropriate Regional docket or Superfund Branch.

An informal written request, rather than a formal request, should be the ordinary procedure for obtaining copies of any of these documents.

II. Purpose and Implementation of the NPL

Purpose

The primary purpose of the NPL is stated in the legislative history of CERCLA (Report of the Committee on Environment and Public Works, Senate Report No. 96–848, 96th Cong., 2d Sess. 60 (1980)):

> The priority lists serve primarily informational purposes, identifying for the States and the public those facilities and sites or other releases which appear to warrant remedial actions. Inclusion of a facility or site on the list does not in itself reflect a judgment

[1] Update #1 (48 FR 40674, September 8, 1983), Update #2 (49 FR 40320, October 15, 1984), Update #3 (50 FR 14115, April 10, 1985) and Update #4 (50 FR 37950, September 18, 1985).

of the activities of its owner or operator, it does not require those persons to undertake any action, nor does it assign liability to any person. Subsequent government action in the form of remedial actions or enforcement actions will be necessary in order to do so, and these actions will be attended by all appropriate procedural safeguards.

The purpose of the NPL, therefore, is primarily to serve as an informational and management tool. The initial identification of a site for the NPL is intended primarily to guide EPA in determining which sites warrant further investigation to assess the nature and extent of the public health and environmental risks associated with the site, and to determine what CERCLA-financed remedial action(s), if any, may be appropriate. The NPL also serves to notify the public of sites EPA believes warrant further investigation.

Federal facility sites are eligible for the NPL pursuant to the NCP at 40 CFR 300.66(c)(2), and are included on the NPL even if there are RCRA hazardous waste management units within the facility boundaries, consistent with the Federal facilities listing policy (54 FR 10520, March 13, 1989). However, section 111(e)(3) of CERCLA, as amended by SARA, limits the expenditure of CERCLA monies at Federally-owned facilities. Federal facility sites are also subject to the requirements of CERCLA section 120, added by SARA.

Implementation

A site can undergo remedial action financed by the Trust Fund established under CERCLA only after it is placed on the final NPL as outlined in the NCP at 40 CFR 300.66(c)(2) and 300.68(a). However, EPA may take enforcement actions under CERCLA against responsible parties regardless of whether the site is on the NPL. The fact that the Agency may defer the listing of a site subject to RCRA Subtitle C does not preclude the use of CERCLA section 104 to respond to a release or CERCLA section 106 to compel action by multiple parties at such a site. EPA also has the authority to take removal actions at any site, whether listed or not, that meets the criteria of the NCP at 40 CFR 300.65-67.

EPA's policy is to pursue cleanup of NPL sites using the appropriate response and/or enforcement actions available to the Agency, including authorities other than CERCLA (e.g., RCRA). Listing a site will serve as notice to any potentially responsible party that the Agency may initiate CERCLA-financed remedial action. The Agency will decide on a site-by-site basis whether to take enforcement or other action under CERCLA or other statutory authorities, to proceed directly with CERCLA-financed response actions and seek to recover response costs after cleanup, or to do both. To the extent feasible, once sites are on the NPL, EPA will determine high-priority candidates for Superfund-financed response action and/or enforcement action through both State and Federal initiatives. These determinations will take into account which approach is more likely to most expeditiously accomplish cleanup of the site while using CERCLA's limited resources as efficiently as possible.

Remedial response actions will not necessarily be funded in the same order as a site's ranking on the NPL—that is, its HRS score. The information collected to develop HRS scores is not sufficient in itself to determine either the extent of contamination or the appropriate response for a particular site. EPA relies on further, more detailed investigations undertaken during the remedial investigation/feasibility study (RI/FS) to address these concerns.

The RI/FS determines the type and extent of contamination. It also takes into account the amount of contaminants in the environment, the risk to affected populations and the environment, the cost to correct problems at the site, and the response actions that have been taken by potentially responsible parties or others. Decisions on the type and extent of action to be taken at these sites are made in accordance with the criteria contained in Subpart F of the NCP. After conducting these additional studies, EPA may conclude that it is not desirable to initiate a CERCLA remedial action at some sites on the NPL because of more pressing needs at other sites, or because a private party cleanup is already underway pursuant to an enforcement action. Given the limited resources available in Superfund, the Agency must carefully balance the relative needs for response at the numerous sites it has studied. It is also possible that EPA will conclude after further analysis that the site does not warrant remedial action.

Revisions to the NPL such as today's rulemaking may move some previously listed sites to a lower position on the NPL. However, if EPA has initiated action such as an RI/FS at a site, it does not intend to cease such actions to determine if a subsequently listed site should have a higher priority for funding. Rather, the Agency will continue funding site studies and remedial actions once they have been initiated, even if higher scoring sites are later added to the NPL.

RI/FS at Proposed Sites. An RI/FS can be performed at proposed sites (or even non-NPL sites) pursuant to the Agency's removal authority under CERCLA, as outlined in the NCP at 40 CFR 300.68(a)(1). Section 101(23) of CERCLA defines "remove" or "removal" to include "such actions as may be necessary to monitor, assess and evaluate the release or threat of release * * *" The definition of "removal" also includes "action taken under Section 104(b) of this Act * * *," which authorizes the Agency to perform studies, investigations, and other information-gathering activities.

Although an RI/FS is generally conducted at a site after the site has been placed on the NPL, in a number of circumstances the Agency elects to conduct an RI/FS at a proposed NPL site in preparation for a possible CERCLA-financed remedial action, such as when the Agency believes that a delay may create unnecessary risks to human health or the environment. In addition, the Agency may conduct an RI/FS to assist in determining whether to conduct a removal or enforcement action at a site.

Facility (Site) Boundaries. The Agency has received a number of inquiries concerning whether EPA could (or would) revise NPL site boundaries. The issue frequently arises where a landowner seeks to sell an allegedly uncontaminated portion of an NPL site. The Agency's position is that it is neither feasible nor consistent with the limited purpose of the NPL (as the mere identification of releases), for the Agency to describe precise boundaries of releases.

CERCLA section (a)(8)(B) directs EPA to list national priorities among the known "releases or threatened releases" of hazardous substances. Thus, the purpose of the NPL is merely to identify releases of hazardous substances that are priorities for further evaluation. Although a CERCLA "facility" is broadly defined to include any area where a hazardous substance release "come to be located" (CERCLA Section 101(9)), the listing process itself is not intended to define or reflect the boundaries of such facilities or releases.[2] Of course, HRS data upon which the NPL placement was based will, to some extent, describe which release is at issue; that is, the NPL release would include all releases evaluated as part of that HRS analysis

[2] Although CERCLA section 101(9) sets out the definition of "facility" and not "release," those terms are often used interchangeability. (See CERCLA section 105(a)(8)(B), which defines the NPL as a list of "releases" as well as the highest priority "facilities.") (For ease of reference, EPA also uses the term "release" and "facility.")

(including noncontiguous releases evaluated under the NPL aggregation policy, *see* 48 FR 40663 (September 8, 1983)).

Because the Agency does not formally define the geographic extent of releases (or sites) at the time of listing, there is no administrative process to "delist" allegedly uncontaminated areas of an NPL site (or to expand sites to follow the contamination where it has come to be located).[3] Such a process would be time-consuming, subject to constant re-verification, and wasteful of resources. Further, the NPL is only of limited significance, as it does not assign liability to any party. *See* Report of the Senate Committee on Environment and Public Works, Senate Rep. No. 96–848, 96th Cong., 2d Sess. 60 (1980), quoted at 48 FR 40659 (September 8, 1983). If a party contests liability for releases on discrete parcels of property, it may do so if and when the Agency brings an action against that party to recover costs or to compel a response action at that property.

EPA regulations do provide that the "nature and extent of the threat presented by a release" will be determined by an RI/FS as more information is developed on site contamination (40 CFR 300.68(d)). However, this inquiry focuses on an evaluation of the *threat* posed; it is not a requirement to define the boundaries of the release, and in any event is independent of the NPL listing. Moreover, it is generally impossible to discover the full extent of where the contamination "has come to be located" prior to completion of all necessay studies *and* remedial work at a site; indeed, the boundaries of the contamination can be expected to change over time. Thus, in most cases, it will be impossible to describe the boundaries of a release with certainty.

At the same time, however, the Agency notes that the RI/FS or Record or Decision (ROD) may offer a useful indication to the public of the areas of contamination at which the Agency is considering taking a response action, *based on information known at that time*. For example, EPA may evaluate (and list) a release over a 400-acre area, but the ROD may select a remedy over 100 acres only. This information may be useful to a landowner seeking to sell the other 300 acres, but it would result in no formal change in the fact that a release is included on the NPL. The landowner (and the public) should also note in such a case that if further study (or the remedial construction itself) reveals that the contamination is located on or has spread to other areas, the Agency may address those areas as well.

This view of the NPL as an initial identification of a release that is not subject to constant re-evaluation is consistent with the Agency's policy of not rescoring NPL sites:

> EPA recognizes that the NPL process cannot be perfect, and it is possible that errors exist or that new data will alter previous assumptions. Once the initial scoring effort is complete, however, the focus of EPA activity must be on investigating sites in detail and determining the appropriate response. New data or errors can be considered in that process . . . [T]he NPL serves as a guide to EPA and does not determine liability or the need for response.

49 FR 37081 (September 21, 1984).[4]

III. NPL Update Process

There are three mechanisms for placing sites on the NPL. The principal mechanism is the application of the HRS. The HRS serves as a screening device to evaluate the relative potential of uncontrolled hazardous substances to cause human health or safety problems, or ecological or environmental damage. The HRS score is calculated by estimating risks presented in three potential "pathways" of human or environmental exposure: ground water, surface water, and air. Within each pathway of exposure, the HRS considers three categories of factors "that are designed to encompass most aspects of the likelihood of exposure to a hazardous substance through a release and the magnitude or degree of harm from such exposure": (1) factors that indicate the presence or likelihood of a release to the environment; (2) factors that indicate the nature and quantity of the substances presenting the potential threat; and (3) factors that indicate the human or environmental "targets" potentially at risk from the site. Factors within each of these three categories are assigned a numerical value according to a set scale. Once numerical values are computed for each factor, the HRS uses mathematical formulas that reflect the relative importance and interrelationships of the various factors to arrive at a final site score on a scale of 0 to 100. The resultant HRS score represents an estimate of the relative "probability and magnitude of harm to the human population or sensitive environment from exposure to hazardous substances as a result of the contamination of ground water, surface water, or air" (47 FR 31180, July 16, 1982). Those sites that score 28.50 or greater on the HRS are eligible for the NPL.

Under the second mechanism for adding sites to the NPL, each State may designate a single site as its top priority, regardless of the HRS score. This mechanism is provided by section 105(a)(98(B) of CERCLA, as amended by SARA, which requires that, to the extent practicable, the NPL include within the 100 highest priorities, one facility designated by each State representing the greatest danger to public health, welfare, or the environment among known facilities in the State.

The third mechanism for listing, included in the NCP at 40 CFR 300.66(b)(4) (50 FR 37624, September 16, 1985), has been used only in rare instances. It allows certain sites with HRS scores below 28.50 to be eligible for the NPL if all of the following occur:

- The Agency for Toxic Substances and Disease Registry of the U.S. Department of Health and Human Services has issued a health advisory which recommends dissociation of individuals from the release.
- EPA determines that the release poses a significant threat to public health.
- EPA anticipates that it will be more cost-effective to use its remedial authority than to use its removal authority to respond to the release.

All of the sites in today's final rule have been placed on the NPL based on HRS scores.

States have the primary responsibility for identifying non-Federal sites, computing HRS scores, and submitting candidate sites to the EPA Regional offices. EPA Regional offices conduct a quality control review of the States' candidate sites, and may assist in investigating, sampling, monitoring, and scoring sites. Regional offices may also consider candidate sites in addition to those submitted by States. EPA Headquarters conducts further quality assurance audits to ensure accuracy and consistency among the various EPA and State offices participating in the scoring. The Agency then proposes the sites that meet one of the three criteria for listing

[3] The Agency has already discussed its authority to follow contamination as far as it goes, and then to consider the release or facility for response purposes to be the entire area where the hazardous substances have come to be located. 54 FR 13298 (March 31, 1989).

[4] See also *City of Stoughton, Wisc.* v. *U.S. EPA*, 858 F. 2d 747, 751 (D.C.Cir. 1988):

> Certainly EPA could have permitted further comment or conducted further testing [on proposed NPL sites]. Either course would have consumed further assets of the Agency and would have delayed a determination of the risk priority associated with the site. Yet * * * "the NPL is simply a rough list of priorities, assembled quickly and inexpensively to comply with Congress' mandate for the Agency to take action straightaway." *Eagle-Picher [Industries* v. *EPA] II*, 759 F. 2d [921,] at 932 [(D.C.Cir. 1985)].

(and EPA's listing policies) and solicits public comments on the proposal. Based on these comments and further review by EPA, the Agency determines final HRS scores and places those sites that still qualify on the final NPL.

IV. Statutory Requirements and Listing Policies

CERCLA restricts EPA's authority to respond to certain categories of releases of hazardous substances, pollutants, or contaminants by expressly excluding some substances, such as petroleum, from the response program. In addition, CERCLA section 105(a)(8)(B) directs EPA to list priority sites "among" the known releases or threatened releases of hazardous substances, pollutants, or contaminants, and section 105(a)(8)(A) directs EPA to consider certain enumerated and "other appropriate" factors in doing so. Thus, as a matter of policy, EPA has the discretion not to use CERCLA to respond to certain types of releases. For example, EPA has chosen not to list sites that result from contamination associated with facilities licensed by the Nuclear Regulatory Commission (NRC), on the grounds that the NRC has the authority and expertise to clean up releases from those facilities (48 FR 40661, September 8, 1983). Where other authorities exist, placing the site on the NPL for possible remedial action under CERCLA may not be appropriate. Therefore, EPA has chosen not to consider certain types of sites for the NPL even though CERCLA may provide authority to respond. If, however, the Agency later determines that sites not listed as a matter of policy are not being properly responded to, the Agency may place them on the NPL.

The listing policy of relevance to this final rule applies to sites subject to the corrective action authorities of RCRA Subtitle C.

V. Development of the NPL/RCRA Policy

Since the first NPL final rule (48 FR 40658, September 8, 1983) the Agency's policy has been to defer listing sites that could be addressed by the RCRA Subtitle C corrective action authorities, even though EPA has the statutory authority to list all RCRA sites that meet the NPL eligibility criterion (i.e., a score of 28.50 or greater under the HRS). Until 1984, RCRA corrective action authorities were limited to facilities with releases to ground water from surface impoundments, waste piles, land treatment areas, and landfills that received RCRA hazardous waste after July 26, 1982. Sites which met these criteria were listed only if they were abandoned or lacked sufficient resources, Subtitle C corrective action authorities could not be enforced, or a significant portion of the release came from nonregulated units.

On November 8, 1984, the Hazardous and Solid Waste Amendments (HSWA) were enacted. HWSA greatly expanded RCRA Subtitle C corrective action authorities as follows:

- Section 3004(u) requires permits issued after the enactment of HSWA to include corrective action for all releases of hazardous waste or constituents from solid waste management units at a treatment, storage, or disposal facility seeking a permit.
- Section 3004(v) requires corrective action to be taken beyond the facility boundary where necessary to protect human health and the environment unless the owner/operator of the facility demonstrates that despite the owner or operator's best efforts, the owner or operator was unable to obtain the necessary permission to undertake such action.
- Section 3008(h) authorizes the Administrator of EPA to issue an order requiring corrective action or such other response measures as deemed necessary to protect human health or the environment whenever it is determined that there is or has been a release of hazardous waste into the environment from a facility with interim status.

As a result of the broadened Subtitle C corrective action authorities of HSWA, the Agency sought comment on a policy for deferring the listing of non-Federal sites subject to the Subtitle C corrective action authorities (50 FR 14117, April 10, 1985). Under the draft policy, the listing of such sites would be deferred unless and until the Agency determined that RCRA corrective action was not likely to succeed or occur promptly due to factors such as:

- The inability or unwillingness of the owner/operator to pay for addressing the contamination at the site.
- Inadequate financial responsibility guarantees to pay for such costs.
- EPA or State priorities for addressing RCRA sites.

The intent of the policy was to maximize the number of site responses achieved through the RCRA corrective action authorities, thus preserving the CERCLA Fund for sites for which no other authority is available. Federal facility sites were not considered in the development of the policy at that time because the NCP prohibited placing Federal facility sites on the NPL.

On June 10, 1986 (51 FR 21057), EPA announced components of a policy for the listing, or the deferral from listing, of several categories of non-Federal sites subject to the RCRA Subtitle C corrective action authorities. Under the policy, RCRA sites not subject to Subtitle C corrective action authorities would continue to be placed on the NPL. Examples of such sites include:

- Facilities that ceased treating, storing, or disposing of hazardous waste prior to November 19, 1980 (the effective date of Phase I of the RCRA regulations), and to which the RCRA corrective action or other authorities of Subtitle C cannot be applied.
- Sites at which only materials exempted from the statutory or regulatory definition of solid waste or hazardous waste were managed.
- RCRA hazardous waste handlers to which RCRA Subtitle C corrective action authorities do not apply, such as hazardous waste generators or transporters not required to have interim status or a final RCRA permit.

Further, the policy stated that certain RCRA sites at which Subtitle C corrective action authorities are available may also be listed if they meet the criterion for listing (i.e., an HRS score of 28.50 or greater) and they fall within one of the following categories:

- Facilities owned by persons who have demonstrated an inability to finance a cleanup as evidenced by their invocation of the bankruptcy laws.
- Facilities that have lost authorization to operate and for which there are additional indications that the owner or operator will be unwilling to undertake corrective action. Authorization to operate may be lost when issuance of a corrective action order under RCRA section 3008(h) terminates the interim status of a facility or when the interim status of the facility is terminated as a result of a permit denial under RCRA section 3005(c). Also, authorization to operate is lost through operation of RCRA section 3005(e)(2) when an owner or operator of a land disposal facility did not certify compliance with applicable ground water monitoring and financial responsibility requirements and submit a Part B permit application by November 8, 1985—also known in HSWA as the Loss of Interim Status Provision (LOIS)).
- Facilities that have not lost authorization to operate, but which have a clear history of unwillingness. These situations are determined on a case-by-case basis.
- On June 24, 1988 (53 FR 23978) EPA amended the June 10, 1986 policy (51 FR 21057) to include four additional categories of RCRA sites as appropriate for the NPL. These categories are:
- Non- or late filers.
- Converters.
- Protective filers.
- Sites holding permits issued before the enactment of HSWA.

In that same June 24, 1988 notice, the Agency proposed to add 13 sites to the NPL on the basis of the amended NPL/RCRA policy, and to drop 30 sites from the proposed NPL because they were subject to the Subtitle C corrective action authorities of RCRA and did not, at the time, appear to fall into one of the categories of RCRA facilities that EPA considers appropriate for listing under the current policy. In addition, in a separate Federal Register notice on the same date (53 FR 23988), the Agency proposed Update #7, which included a number of RCRA sites for listing under the NPL/RCRA policy. Nine of these sites are being added to the NPL in today's final rule. Also, on May 5, 1989 (54 FR 19526), the Agency proposed Update #8, which included 10 sites. One of these sites, a RCRA site, received no comment and is being added to the NPL in today's final rule.

Unwillingness Criteria

As part of the NPL/RCRA policy announced on June 10, 1986 (51 FR 21059), EPA explained its policy of listing RCRA sites where the owner/operator has demonstrated an unwillingness to take corrective action. The policy stated that, as a general matter, EPA prefers using available RCRA enforcement or permitting authorities to require corrective action by the owner/operator at RCRA sites because this helps to conserve CERCLA resources for sites with no financially viable owner/operator. However, when the Agency determines that a RCRA facility owner/operator is unwilling to carry out corrective action directed by EPA or a State pursuant to a RCRA order or permit, there is little assurance that releases will be addressed in a timely manner under a RCRA order or permit. Therefore, such facilities should be listed in order to make CERCLA resources available expeditiously. Under the policy, RCRA facilities will be placed on the NPL when owners/operators are found to be unwilling based on a case-by-case determination.

Several RCRA facilities being finalized in this rule were proposed for the NPL based upon their HRS scores and EPA's case-by-case determination that the owner/operators were unwilling to take corrective action. For each such site, the Agency has prepared a lengthy memorandum to the record, documenting the actions (or failures to act) upon which the unwillingness finding was based. EPA solicited comment on the listing of these sites (and on the findings of unwillingness), and is responding to comment here and in the accompanying support document. EPA believes that the sites are appropriate for the NPL. On August 9, 1988 (53 FR 30005), EPA added objective criteria to its policy for determining unwillingness. Specifically, a RCRA facility would be placed on the NPL based on unwillingness when the owner/operators are not in compliance with one or more of the following:

- Federal or substantially equivalent State unilateral administrative order requiring corrective action, after the facility owner/operator has exhausted administrative due process rights
- Federal or substantially equivalent State unilateral administrative order requiring corrective action, if the facility owner/operator did not pursue administrative due process rights within the specified time period
- Initial Federal or State preliminary injunction or other judicial order requiring corrective action
- Federal or State RCRA permit condition requiring corrective action after the facility owner/operator has exhausted administrative due process rights
- Final Federal or State consent decree or administrative order on consent requiring corrective action, after the exhaustion of any dispute resolution procedures

However, the Agency explained it would be both unnecessary and inappropriate to go back and reexamine already proposed sites based on the revised criteria. First, the revised criteria had not been announced when the sites in this rule were evaluated for unwillingness and proposed for the NPL. Second, the new criteria do not represent a substantive change, but rather, an attempt at developing more easily applied and understood objective crtieria. EPA believes that the determinations of unwillingness made for the sites in this rule fully satisfy the Agency's policy and goals. Third, the Agency recognized that some lead time would be necessary for the Regions and States to apply the new criteria to sites before submitting them for proposal to the NPL; specifically, the Regions and States would be required to issue corrective action orders at RCRA sites before determining unwillingness, rather than evaluating all evidence on a case-by-case basis. Thus, the Agency decided to apply the new criteria only to sites proposed after August 9, 1988, so as not to significantly and unneccessarily delay promulgation and response action at already proposed sites.

Amended NPL/RCRA Policy

On June 24, 1988 (53 FR 23978), the Agency amended its NPL/RCRA policy by adding four categories of RCRA sites appropriate for listing.

(1) *Non- or late Filers:* Facilities that were treating storing or disposing of Subtitle C hazardous waste after November 19, 1980, and did not file a Part A RCRA permit application by that date and have little or no history of compliance with RCRA.

The Agency decided to place on the NPL "non- or late filers" based on the finding that RCRA treatment, storage or disposal facilities ("TSDFs") that fail to file Part A of the RCRA permit application generally remain outside the range of cognizance of authorities responsible for compliance with RCRA, and generally are without the institutional mechanisms, such as ground water monitoring programs, necessary to assure prompt compliance with the standards and goals of the RCRA program. Therefore, EPA believes that it is not appropriate to defer to RCRA for action at these sites, even though RCRA technically may apply. However, in cases where non- or late filer facilities have in fact come within the RCRA system and demonstrated a history of compliance with RCRA regulations (as may be the case with late filers), the Agency may decide to defer listing and allow RCRA to continue to address problems at the site.

(2) *Converters:* Facilities that at one time were treating or storing RCRA Subtitle C hazardous waste but have since converted to an activity for which interim status is not required (e.g., generators who store hazardous waste for 90 days or less). These facilities, the withdrawal of whose Part A application has been acknowledged by EPA or the State, are referred to as converters.

Converters at one time treated or stored Subtitle C hazardous waste and were required to obtain interim status. EPA believes that under RCRA section 3008(h) it can compel corrective action at such sites. However, RCRA's corrective action program currently focuses on TSDFs subject to permitting requirements, and thus EPA has not routinely reviewed converters under RCRA Subtitle C. EPA has decided that the deferral of this category of sites is not appropriate, as these sites are not currently engaged in treatment, storage, or disposal activities subject to RCRA permitting and they are not a priority for prompt corrective action under RCRA. Instead, the Agency has decided to list such sites to make full CERCLA resources and authorities available, if necessary. In cases where a converter has agreed to corrective action under a RCRA unilateral or consent corrective action order, the Agency will generally defer listing and allow RCRA to continue to address problems at the site.

EPA is currently prioritizing RCRA facilities for corrective action. If the

Agency determines that converter sites will in the future be addressed in an expeditious manner by RCRA authorities, then it will reconsider the listing policy for RCRA converter sites and may defer converters to RCRA for corrective action.

(3) *Protective Filers:* Facilities that have filed RCRA Part A permit applications for treatment, storage, or disposal of Subtitle C hazardous waste as a precautionary measure only. These facilities may be generators, transporters, or recyclers of hazardous wastes, and are not subject to Subtitle C corrective action authorities.

These facilities filed RCRA Part A permit applications as TSDFs as a precautionary measure only, and are generators, transporters, or recyclers of hazardous wastes. Protective filers are not subject to Subtitle C corrective action authorities, and thus, EPA has decided to place them on the NPL in order to make full CERCLA resources and authorities available.

(4) *Pre-HSWA Permittees:* Facilities with RCRA permits for the treatment, storage, or disposal of Subtitle C hazardous waste that were issued prior to the enactment of HSWA, and whose owner/operator will not voluntarily consent to the reissuance of their permit to include corrective action requirements.

For facilities with permits that pre-date HSWA, the owner/operators are not required through the permit to perform corrective action for releases from solid waste management units, and the Agency does not have the authority to modify such pre-HSWA permits to include facility-wide RCRA corrective action under RCRA section 3004(u) until the permit is reissued. Because many pre-HSWA permits are for 10 years, with the last pre-HSWA permit having been issued prior to November 8, 1984, it could be 1994 before the Agency could reissue some permits to include corrective action requirements. Therefore, the Agency has decided to list RCRA facilities with pre-HSWA permits (that have HRS scores of at least 28.50, or are otherwise eligible for listing), so that CERCLA authorities will be available to more expenditiously address any releases at such sites. However, if the permitted facility consents to the reissuance of its pre-HSWA permit to include corrective action requirements, the Agency will consider not adding the facility to the NPL.

Financial Inability to Pay

On August 9, 1988 (53 FR 30002), EPA solicited comment on amendments to the NPL/RCRA policy concerning the inability of an owner/operator to pay for cleanup at a RCRA-regulated site. The Agency received a number of comments on the amendments under consideration, but has made no final decision concerning these issues. The Agency will respond to comments and announce its decision on this policy in the future.

VI. Response to Public Comments

The Agency received a number of comments on the June 24, 1988 amendments to the NPL/RCRA policy, and on the application of those amendments and the June 10, 1986 NPL/RCRA policy to sites proposed for the NPL. Responses to the significant comments concerning the general application of the amended criteria are summarized below. All site-specific comments are summarized and responded to in the support document accompanying this rule, which is available in the Superfund dockets.

VI.a. Support for the Policy

A number of commenters supported the policy to drop sites from the NPL that can be adequately addressed under the corrective action authorities of RCRA Subtitle C. One commenter supported EPA's ability to initiate short-term emergency actions at RCRA sites. Another commenter supported the planned use of RCRA authority whenever possible, since the use of RCRA authorities "avoids the administrative complexity and unneeded political burden of NPL listing."

In response, the Agency notes that its decision to defer certain sites subject to the RCRA Subtitle C corrective action authorities is based on the ability of those authorities to achieve cleanup at a site and to preserve CERCLA resources for use at other sites.

VI.b. Opposition to the Policy

A number of commenters opposed dropping RCRA sites from the proposed NPL, transferring the sites from CERCLA to RCRA authorities, on the grounds that Superfund authorities are more protective of human health and the environment than are RCRA authorities. One commenter stated that Superfund cleanup standards are more stringent than RCRA's. The commenter noted that CERCLA requires permanent treatment to the maximum extent feasible, whereas RCRA does not. The commenter added that the RCRA program does not include cleanup guidelines similar to those under Superfund. Another commenter stated that CERCLA offers more remedial options than RCRA.

In response, both statutes require that remedies employed protect human health and the environment. The Agency intends for the two programs to provide similar cleanup solutions for similar environmental problems, even if procedural requirements differ. Indeed, one of the Agency's primary objectives in development of the RCRA corrective action regulations is to achieve substantive consistency with the CERCLA remedial program.

The NPL/RCRA policy is based on efficient allocation of limited CERCLA resources. Although CERCLA provides authority to clean up all sites, including RCRA sites, using CERCLA in all cases would be inefficient because RCRA has authority to conduct certain cleanup actions. Corrective action provisions are now required in RCRA permits, which direct activities at the site, often long after cleanup actions are completed. By deferring to RCRA, more sites are addressed, and the overall goals of both statutes are advanced.

Two commenters opposed transferring sites from CERCLA to RCRA authorities, maintaining that enforcement oversight is greater under CERCLA than RCRA.

In response, EPA believes the RCRA program assures adequate oversight. RCRA orders and permits establish oversight on a site-by-site basis. If a remedial action is extremely complex or the owner/operator is not fully cooperative, EPA may provide extensive oversight. In other cases, extensive oversight is not necessary. In any event, EPA inspection requirements apply to all sites under RCRA corrective action authorities. Under RCRA, States may be authorized to operate a hazardous waste program in lieu of the Federal program. Consequently, in many cases States provide oversight (RCRA section 3006).

One commenter opposed the policy to drop RCRA sites from the NPL because RCRA was not intended as a cleanup bill.

In response, the Agency disagrees. As discussed earlier, HSWA greatly expanded Subtitle C corrective action authorities, and EPA believes a complete cleanup can be achieved under RCRA. As the House Committee on Energy and Commerce noted in its report on HSWA:

> Unless all hazardous constituent releases from solid waste managment units at permitted facilities are addressed and cleaned up the Committee is deeply concerned that many more sites will be added to the future burdens of the Superfund program with little prospect for control or cleanup. The responsibility to control such releases lies with the facility owner and operator and should not be shifted to the Superfund program, particularly when a final [RCRA] permit has been requested by the

facility. H.Rept. 198, 98th Cong., 1st Sess. 61 (1983).

Sites are not included on the NPL if they are subject to the RCRA Subtitle C corrective action authorities and prompt cleanup appears likely. RCRA authorities may be used by themselves or in conjunction with CERCLA removal and enforcement authorities to initiate corrective action or to continue actions already begun. For sites being dropped from the proposed NPL, if a CERCLA Remedial Investigation/Feasibility Study (RI/FS) or enforcement actions have been initiated, these actions will continue in order to avoid disruption of site cleanup activities. And, of course, deferred RCRA sites may later be added to the NPL if corrective action is not being taken.

One commenter stated that the deletion of sites prior to a complete cleanup sets a bad precedent. The commenter believes that the removal of a site from the NPL because it is being managed under RCRA could give the false impression that the site is no longer a significant threat to public health and the environment.

In response, the deferral of a site to RCRA authorities does not mean that the Agency has determined that cleanup is complete or that a site no longer poses a threat to human health and the environment. Rather, it means that the Agency has determined that the sites can be addressed under another authority, and that, to conserve CERCLA resources and avoid duplication, listing should not proceed. Furthermore, the Agency does not believe that the deferral of a site to RCRA authorities jeopardizes any cleanup that is underway or planned.

The Agency has requested comment on deleting certain final RCRA sites from the NPL in the proposed NCP revisions (53 FR 51421, December 21, 1988); even under the proposed approach, sites would only be deferred where response action was "progressing adequately" under an enforcement order or a RCRA permit and where several other conditions were met.

Several commenters stated that, because RCRA does not give EPA the powers granted by CERCLA, and because not all CERCLA authorities are available at sites not on the NPL, deferring a site from the NPL may deny the Agency the full scope of authorities necessary to compel cleanup by a responsible party. The commenters were particularly concerned that CERCLA cost recovery authorities are not available at RCRA sites. One commenter added that the lack of joint and several liability authorities under RCRA may obstruct RCRA cleanup at multiparty sites where one party is unwilling.

In response, the only authority unavailable at a deferred RCRA facility is use of the CERCLA Trust Fund for remedial action. The Agency retains ample authorities, under both RCRA and CERCLA, to ensure expeditious cleanup at RCRA facilities. CERCLA section 104 removal actions, including Fund-financed RI/FS's, can be taken at RCRA sites to respond promptly to a release, and cost recovery for such actions would be available. In addition, where an "imminent and substantial endangerment" is posed by a release at a RCRA facility, the Agency may take enforcement action under CERCLA section 106 and thereby compel action by multiple parties.

Although cost recovery and joint and several liability provisions are not available for all RCRA actions, significant authorities are available under RCRA. First, enforcement actions against multiple parties can be brought under RCRA section 7003 if an imminent hazard exists. Second, EPA has corrective action authorities under RCRA section 3008(h) at interim status facilities and under RCRA section 3004 (u) and (v) at permitted facilities. Third, RCRA section 3013 gives EPA authority to conduct investigations and studies at RCRA facilities and require the owner/operator to reimburse EPA for the costs. Although RCRA focuses on owner/operator liability, the Agency can take joint RCRA/CERCLA actions where appropriate (e.g., surface cleanups under RCRA, ground water cleanups under CERCLA section 106), making multiple party solutions feasible.

Under RCRA Subtitle C authorities, liability focuses on the owner/operator for cleanup of hazardous waste releases. However, if the owner/operator is unwilling or unable to carry out such action, EPA may decide to place the site on the NPL to allow Fund-financed cleanup. The Agency may then pursue cost recovery against the owner/operator and other Potentially Responsible Parties (PRPs).

Several commenters opposed transferring sites to RCRA because, they stated, CERCLA provides for more public participation. In addition, one commenter noted that Technical Assistance Grants (TAGs) and public hearing requirements available under Superfund are not available at sites being dropped from the NPL (53 FR 9741, March 24, 1988).

In response, although the process is somewhat different in the two statutes, public participation nevertheless plays an important role in reaching cleanup decisions under both. The commenter is correct in stating that, under CERCLA section 117(e)(1), a TAG is not available if a site is not on or proposed for the NPL. However, the RCRA program provides for significant public participation opportunities. When issuing a draft permit (or notice of intent to deny), the Agency gives public notice and allows 45 days for written comment. If interest is expressed, public hearings must be held. The Agency will also issue a fact sheet or a statement of basic about the permitting process that is taking place. Procedures for modifying permits at the remedy selection stage, for example, provide similar opportunities for public involvement.

Remedy selection through the permitting process offers public notice and comment opportunities like those in the development of a Superfund Record of Decision. Public participation requirements are also included in a RCRA corrective action order, the amount depending on the circumstances. At a minimum, the public has the opportunity to comment on the corrective measure EPA proposes; EPA considers and responds to all comments received on the corrective measure, and may change the corrective measure in response to public comment. Requirements for additional public involvement, such as public meetings, may be included in the order based on public interest.

VI.c. General Policy Comments/Suggestions

Two commenters stated that to obtain maximum cleanup, EPA should use both RCRA and CERCLA authorities. The commenters believe there will be some instances when one law or the other will be more effective.

The Agency agrees. In general, the NPL/RCRA policy considers which authority is likely to most expeditiously accomplish cleanup, while using the Fund's limited resources as efficiently as possible. If a CERCLA section 106 enforcement action requiring cleanup has been initiated, and a RCRA permit is to be issued to the facility, the Agency may choose to continue these actions under CERCLA. In such cases, the CERCLA cleanup undertaken by the responsible parties would be considered in the RCRA permit proceedings, and the Agency would take steps to avoid inconsistent cleanup actions under RCRA sections 3004(u) at the affected portion of the facility.

One commenter argued that the use of RCRA or CERCLA should not depend upon the solvency of the owners or operators of a site.

The Agency disagrees. RCRA Subtitle C authorities make owner/operators liable for cleanup of most hazardous waste releases. The Agency has simply decided, as a matter of policy, that where the owner/operator is unable to pay for cleanup (e.g., has invoked the protection of the bankruptcy laws), the Agency should list the RCRA-regulated facility and thereby make Superfund moneys available for possible remedial action.

A number of commenters suggested the Agency should defer the listing of RCRA facilities if corrective action is being implemented under other authorities, or is being pursued voluntarily by the owner/operator. Commenters stated that EPA should defer the listing of sites being addressed under CERCLA section 106 enforcement orders, or sites being addressed under State authorities (regardless of whether State programs are RCRA authorized). One commenter argued that listing RCRA sites already being addressed by State agencies discourages owner/operators from cooperating with State authorities since EPA may supplant State enforcement efforts. According to the commenter, for sites with well-advanced remedial action programs under State authorities, a shift to CERCLA would result in a delay and a duplication of effort.

In response, the Agency at present defers to a limited number of authorities, including RCRA Subtitle C. In the proposed revisions to the NCP, the Agency has solicited comment on a policy to expand deferral to include deferral to other Federal and State authorities (53 FR 51415, December 21, 1988); however, that policy is not currently in effect. The Agency has committed not to implement any part of the expanded deferral approach until the public and Congressional concerns have been fully reviewed and analyzed and a decision reached on whether or not to implement such a policy.

The Agency does not agree that its NPL/RCRA policy results in EPA supplanting State enforcement efforts. Before a CERCLA RI/FS is begun at a site (often after listing), a State or voluntary action may proceed unencumbered. Even after an RI/FS is underway, EPA may allow a PRP to go forward with voluntary or State-ordered remedial actions, pursuant to CERCLA section 122(e)(6) (see 54 FR 10520, March 13, 1989). Even if a PRP is not authorized to go forward with non-CERCLA remedial actions, the Agency will consider the work accomplished; thus, actions under State law will not have been wasted. However, if EPA finds that remedial action under CERCLA is still necessary, then the cleanup standards of CERCLA section 121 must be met.

Several commenters argued that shifts of responsibility from one program to the other (RCRA or CERCLA) may result in counterproductive changes in oversight personnel, duplication of administrative effort, and ultimately, delays in cleanup of sites. Commenters expressed particular concern about programmatic shifts at sites in the latter stages of a remedial effort, at sites undergoing an RI/FS, and at sites with multiple PRPs.

In response, the Agency generally prefers to apply RCRA authorities at RCRA sites, and has developed the NPL/RCRA policy to avoid duplication and delays. In addition, EPA will ensure that actions undertaken by one program will be adopted by the other program if programmatic responsibility shifts. One of the Agency's primary objectives in the development of the RCRA corrective action regulations is to achieve substantive consistency with the remedial program under CERCLA. CERCLA section 104 or section 106 enforcement orders for remedial activities can be referenced in a RCRA permit. In such cases, the Agency would take steps to avoid inconsistent cleanup actions under RCRA section 3004(u) at the affected portion of the facility.

At RCRA sites with many PRPs, EPA may choose to proceed with an enforcement action under CERCLA section 106. Even if the Agency proceeds against the owner/operator alone under RCRA, the owner/operator may seek to recover costs from other PRPs under CERCLA section 107(a)(4)(B); of course, to maintain such an action, the owner/operator would have to show that the costs incurred under RCRA were consistent with the National Contingency Plan.

A number of commenters stated that placing new categories of RCRA sites—such as converter sites—on the NPL will overburden CERCLA resources and increase the possibility that sites on the NPL will not be addressed expeditiously.

In response, after considering the potential impact the NPL/RCRA policy may have, the Agency concluded that the policy will not significantly impact the Trust Fund or jeopardize the timely cleanup of other sites on the NPL.

As noted above, the Agency will consider deferring converter sites if the new prioritizing initiative under RCRA results in their prompt consideration for RCRA corrective action. In addition, the Agency will consider deferring individual converter sites that have agreed to corrective action under a RCRA permit or order. Similarly, where it appears that certain late filers or pre-HSWA permittee sites will be cleaned up under RCRA, EPA will defer those sites. Finally, even where RCRA sites have been placed on the final NPL, the proposed revisions to the NCP consider deleting such sites for corrective action under RCRA in certain prescribed circumstances (see 53 FR 51421, December 21, 1988).

Two commenters opposed including new categories of RCRA sites in the NPL/RCRA policy. According to one commenter, EPA has departed from its established policy to place on the NPL only those RCRA sites where the owner/operator is unwilling or financially unable to implement the remedy. The commenter argues that EPA has improperly expanded the listing policy to include RCRA sites where RCRA will produce a cleanup. The commenter suggests making the categories no more than rebuttable presumptions for listing.

EPA disagrees with the commenter's suggestion that the Agency acted improperly. The NPL/RCRA policy is, as its name suggests, simply a general statement of policy, issued to advise the public of how the Agency intends to exercise a discretionary power. The Agency is free to decide to change that policy, as it did here, and advise the public of that change (53 FR 23978, June 24, 1988). Indeed, as with any policy, the Agency can exercise its discretion as to whether to apply the policy at all in specific cases (Davis, *Administrative Law Treatise*, section 7:5 (Supp. 1982)).

EPA's June 1988 decision to list—that is, not defer from listing—four new categories of RCRA sites was not inconsistent with the Agency's prior policy on the deferral and listing of RCRA sites; rather it was an expansion of the existing policy. Initially, the Agency decided to defer listing for sites already regulated under RCRA, in order to avoid duplicative actions, maximize the number of cleanups, and help preserve the Trust Fund. The Agency did, however, state that it would list RCRA sites if expeditious cleanup appeared to be unlikely under RCRA, such as when an owner/operator proved to be unwilling or unable to take corrective action EPA deemed necessary (51 FR 21057, June 10, 1986).

Over time, the Agency has developed more experience with the RCRA deferral program and with RCRA cleanups at sites deferred from the NPL. EPA has determined that prompt corrective action under RCRA is not likely when a RCRA owner/operator is unwilling or

unable to pay, a protective filer, a non- or late filer, a converter, or a pre-HSWA permittee. Just as unwillingness is not a requirement for demonstrating inability, neither is it a requirement for demonstrating non-filer or converter status. The rationale for listing the new categories is to capture all potential types of sites that are unlikely to be cleaned up expeditiously under RCRA; the policy does not infer unwillingness on the part of the owner/operator. Converters, non- or late filers, and pre-HSWA permittees, while technically within RCRA jurisdiction, are not likely to be addressed promptly by RCRA. Non-filers generally remain outside the legal cognizance of RCRA, and therefore lack the institutional mechanisms necessary to assure prompt compliance with the standards and goals of RCRA. (If a non- or late filer comes within the RCRA system and demonstrates a history of compliance with RCRA regulations, the Agency may decide to defer listing). Converters, while within the legal purview of RCRA, are not routinely reviewed under Subtitle C because of the current priorities of the RCRA corrective action program. Finally, the Agency does not have the authority to modify pre-HSWA permits to include RCRA corrective action under RCRA section 3004(u) until the permit is reissued; therefore, it could be 1994 before the Agency could reissue some permits to include corrective action.

The Agency agrees with the commenter that RCRA sites may be listed under the new criteria even if there is no express finding of unwillingness. The new categories are not subsets of the unwillingness exception to the NPL/RCRA policy. Rather, these categories are situations where cleanups are not progressing expeditiously under RCRA, making it appropriate to provide the option of spending CERCLA funds for remedial action.

The commenter's suggestion that the four categories be made no more than "rebuttable presumptions" for listing is largely addressed by the policy. The Agency has stated that, in general, it will not defer non- or late filers, although it will consider deferring a site with a history of RCRA compliance such that the Agency has confidence that it will be addressed under RCRA. Similarly, RCRA sites with pre-HSWA permits will be deferred if the permittee agrees to reissuance of the permit, with corrective action provisions included. As for converters, EPA will consider deferring individual converter sites that have agreed to corrective action under a RCRA unilateral or consent corrective action order, and the Agency will reconsider its general policy for listing converters if it finds that converters are being addressed promptly under RCRA (53 FR 23981, June 24, 1988). The Agency does not have authority to compel RCRA corrective action in the case of protective filers.

One commenter requested adding a listing criterion for sites being addressed as part of a basin-wide scheme under CERCLA.

The response, EPA does not intend to add such a criterion. Under the present policy, the Agency has mechanisms for accomplishing comprehensive remedies at such sites without placing them on the NPL (not listing a site limits only the availability of Fund financing for remedial action). Area-wide contamination involving RCRA and CERCLA units may be addressed under: (1) an area-wide CERCLA section 106 order or (2) a hybrid of RCRA and CERCLA authorities, with RCRA addressing the surface cleanup of RCRA units, CERCLA addressing the surface cleanup of CERCLA units, and CERCLA addressing the cleanup of overlapping ground water contamination (with the RCRA owner/operator as a potentially responsible party). In either case, the Agency may also choose to do one comprehensive RI/FS study of the area under its CERCLA removal authority (54 FR 13298, March 31, 1989).

One commenter stated that the decision on which authority to use should be made after the site is placed on the final NPL. According to the commenter, placement of a site on the NPL does not bind either EPA or owner/operators and PRPs to address the site under RCRA or CERCLA, and allows EPA to use enforcement authorities RCRA does not have, if necessary.

In response, it is true that placing a site on the NPL does not force the Agency to use CERCLA authorities, or CERCLA authorities alone. The Agency is free to use CERCLA and/or any other authorities that apply to the site in question. The converse is also true—EPA can use CERCLA removal and enforcement authorities at NPL and non-NPL sites. The NPL serves primarily as a management tool for the Agency in setting priorities under CERCLA, especially for use of the Trust Fund. The NPL/RCRA policy is one tool in this prioritization process; its goal is to maximize the overall number of site cleanups by using RCRA corrective action authorities where available and likely to result in espeditious cleanup, thus preserving CERCLA resources for other sites. The Agency believes that RCRA owner/operators should finance cleanups at their facilities. If, however, the owner/operator is unwilling or unable to finance cleanup, or the facility is outside the RCRA regulatory system (a non-filer), the Agency has established criteria for the listing of these sites.

The commenter stated it would be poor policy to transfer sites from CERCLA to RCRA at the end of the Reagan Administration. The commenter believes the new Administration should reassess the policy.

In response, this rule has been reviewed by and signed by the current Administration. The NPL/RCRA policy is being continued, subject to periodic review.

VI.d. Non- or Late Filers

The commenter argued that the decision to list a non- or late filer should be based on the facility's history of compliance with RCRA. The commenter added that the Agency should assure that sites that filed a part A permit application late, or not at all, but that have subsequently made an effort to comply with RCRA regulations, will be deferred from the NPL. According to the commenter, potential buyers of non- or late filer facilities will be inhibited from buying these facilities (and cleaning them up) because of the possibility of listing.

In response, EPA deliberately stated that it "will consider" deferring certain non- or late filers, because the Agency does not wish to imply that deferral is automatic. The Agency will consider for deferral any non- or late filer facility that has come within the RCRA system and demonstrated a history of compliance with RCRA regulations. The Agency does not believe that its determination of the adequacy of a non- or late filer's effort to comply with RCRA regulations will inhibit a potential sale. A non- or late filer that complies with the appropriate RCRA regulations and actively pursues corrective action under RCRA (through a permit or order) will generally be seen as a good candidate for deferral.

The commenter stated that non- or late filing often results from ignorance of regulatory requirements, and that placing a site on the NPL should therefore be based on willingness, not history of RCRA compliance.

In response, non- or late filers are not subsets of the unwillingness exception to the RCRA deferral policy. Rather, the Agency has identified this and two other categories as situations where cleanups may not progress expeditiously under RCRA, and thus EPA wants the option of spending CERCLA funds for remedial action. The decision to add a non- or

late filer site to the NPL is generally based on the fact that no timely permit application has been made, and thus adequate regulatory mechanisms (e.g., ground water monitoring programs, compliance inspections, and closure requirements) may not be in place to assure prompt compliance with the standards and goals of the RCRA program. Because of RCRA program priorities, the Agency may not always be able to immediately address a non- or late filer that is suddenly willing to be addressed under RCRA authorities. The Agency believes that in most cases it is in the best interest of environmental protection to make CERCLA funds available at such sites.

VI.e. Converters

One commenter supported the proposed policy to list converters but suggested that the policy should include facilities that submitted part A permit applications under RCRA and did not actively pursue part B permits and/or whose operations no longer demand a part B permit. The commenter refers to these sites as "de facto" converters and believes they should be treated the same as generators.

In response, converters are facilities that at one time treated or stored RCRA subtitle C hazardous waste but have since converted to generator-only status (i.e., facilities that now store hazardous waste for 90 days or less, an activity for which interim status is not required). The sites described by the commenter will be considered converters only if there is documentation of conversion and the Agency agrees that the sites are appropriate for the NPL.

The Agency does not believe that converters should receive the same treatment as generators with regard to the NPL. The Agency does not have corrective action authority under RCRA subtitle C to compel cleanup at generator-only facilities, and thus deferral to RCRA for corrective action would be inappropriate. By contrast, the Agency can, under subtitle C, compel corrective action at converter facilities; however, because of current priorities in the RCRA program, the Agency believes converter facilities should be placed on the NPL to ensure prompt corrective action.

Some of the facilities described by the commenter may also be protective filers; that is, they filed a Part A permit application as a precautionary measure only and did not pursue a Part B permit. If a facility did in fact file for interim status protectively, listing may be appropriate under this policy.

Several commenters suggested that the policy for listing converters unfairly penalizes owner/operators that take environmentally responsible actions to close waste handling activities and convert to generators status. The commenter stated that the policy would inhibit owner/operators from reducing their hazardous waste activities, because if they converted to generator status they might be placed on the NPL as a converter.

In response, the Agency does not list a RCRA site solely on the basis of a its decision to discontinue treatment or storage activities. A site must receive an HRS score equal to or higher than the cutoff score to be placed on the NPL. The Agency believes it unlikely that, to avoid listing, a facility owner/operator would choose to retain treatment or storage status, which means the site remains subject to all RCRA requirements, including cleanup under RCRA corrective action authorities. In addition, it is unlikely and owner/operator will incur the cost of RCRA permitting and/or oversight merely to avoid listing. Finally, if a converter agrees to corrective action under RCRA, the Agency will generally defer the listing of such a site.

One commenter opposed the listing of converters, arguing that the Agency should use RCRA section 3008(h) corrective action authorities at such facilities. According to the commenter, the RCRA program should prioritize and allocate its resources to address any sites, including converters, that may need corrective action.

The Agency believes that under RCRA section 3008(h) it can compel corrective action at converter facilities. Nonetheless, the Agency has decided, as a matter of policy, to list converters since EPA has not routinely reviewed converters under RCRA subtitle C, and the Agency believes it can ensure expeditious remedial action at these sites if they are placed on the NPL. The EPA is currently prioritizing RCRA facilities for corrective action. If the Agency determines that converter sites will be addressed in an expeditious manner by RCRA authorities, then it will reconsider the policty to list converters.

Moreover, where a converter has agreed to corrective action such as under a RCRA section 3008(h) order, the Agency will generally defer listing such sites and allow RCRA to continue to address the contamination problems at the site.

VI.f. Protective Filers

Two commenters agreed with EPA's conclusion that the Agency does not have the authority to compel cleanup of protective filers under RCRA subtitle C corrective action authorities. One commenter suggested RCRA section 7003 authorities as an alternative to CERCLA authorities when an "imminent and substantial endangerment" exists.

In response, since the beginning of the NPL, EPA's clear policy has been to defer the listing of RCRA sites where the regulatory authorities of RCRA subtitle C apply. For example, on September 8, 1983 (48 FR 40662), the Agency stated: "where a site consists of regulated units of a RCRA facility operating pursuant to a permit or interim status, it will not be included on the NPL" (48 FR 40662). The Agency explained that the Hazardous Waste Management Regulations (40 CFR 260–265) give EPA and the states authority to control sites through a broad program which includes monitoring, compliance inspections, penalties for violations, and requirements for post-closure plans and financial responsibility.

The passage of HSWA, in 1984, expanded RCRA's corrective action authorities under subtitle C even further, and the scope of the RCRA deferral policy was corespondingly expanded. The deferral policy was thus based on a determination that in most cases, hazardous waste treatment, storage and disposal facilities would be managed and permitted (or closed) under an on-going RCRA regulatory system, and that in most appropriate cases, contamination would be cleaned up.

EPA did not, in its NPL/RCRA policy, propose to defer sites if a RCRA section 70003 enforcement action could potentially be taken. Unlike the provisions of RCRA subtitle C, which set up an on-going program for the management of hazarous wastes, section 7003 provides authority for the Agency to take enforcement actions in extraordinary cases where "the past or present handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste may present an imminent or substantial endangerment to health or the environment." Although limited to cases involving imminent and substantial endangerment, section 7003 is sweeping at the same time. It applies to past RCRA owners as well as present owner/operators, and it applies to all facilities that handle "solid" (nonhazardous) wastes; solid waste facilities are not required to have RCRA subtitle C permits or interim status. EPA has determined that it would not be appropriate to defer listing RCRA sites (and solid waste sites) to section 7003 simply because that section might provide a means of addressing contamination problems. Rather, EPA

has limited deferral to cases where the subtitle C regulatory program is in place, and prompt corrective action appears likely.

VI.g. Pre-HSWA Permittees

Several commenters opposed listing pre-HSWA permittees because they believe Congress intended that pre-HSWA permitted facilities be addressed under RCRA. The commenters stated that EPA has authority under RCRA section 3005(c)(3) to modify a permit at any time to comply with currently applicable RCRA regulations, including corrective action, and under RCRA section 7003 to require cleanup if an "imminent and substantial endangerment" exists. The commenters believe that listing pre-HSWA permittees would circumvent Congressional intent and burden Superfund. One commenter added that the Agency's requirement that a facility with a final RCRA permit "consent" to a modification of its pre-HSWA permit, including corrective action requirements to avoid listing, consitutes an abuse of Agency authority.

In response, RCRA section 3005(c)(3), which states "Nothing in this subsection shall preclude the Administrator from reviewing and modifying a permit at any time during its term," merely preserved preexisting authority to modify permits. However, facility-wide corrective action at RCRA facilities applies only when the permit is issued or reissued. Section 3004(u), the facility-wide corrective action authority, requires such corrective action only for permits "issued" after 1984. Under EPA regulations, a "modification" is significantly different from a permit issuance. Modification of a pre-HSWA permit does not trigger 3004(u) corrective action; the permit must be reissued to include facility-wide corrective action.

Because the Agency lacks authority to address pre-HSWA permittees through RCRA section 3004(u) until permit reissuance, there is no immediate mechanism to require corrective action at pre-HSWA permitted facilities. As EPA explained on June 24, 1988 (53 FR 23978), many pre-HSWA permits were issued for 10 years, and the last pre-HSWA permit was issued in 1984. Thus, it could be 1994 before the Agency can reissue all pre-HSWA permits to include facility-wide corrective action. The Agency is proposing that facilities with pre-HSWA permits be considered for the NPL in order to assure expeditious corrective action at the site.

The Agency disagrees that allowing a pre-HSWA permittee to consent to modification of its permit rather than to be placed on the NPL is an "abuse of authority." Allowing a pre-HSWA permittee to consent to reissuance of its pre-HSWA permit to include 3004(u) corrective action rather than be placed on the NPL gives the opportunity to clean up under RCRA if the permittee chooses to do so.

VI.h. Application Of Unwillingness Policy

Several commenters asserted that sites proposed for the NPL based on the case-by-case unwillingness criteria of June 10, 1986 (51 FR 21057) should be re-examined under the revised criteria of August 9, 1988 (53 FR 30005).

In response, the Agency specifically stated that the new criteria should be applied prospectively only, and that it would be unnecessary and inappropriate to devote CERCLA resources to an additional review of unwillingness determinations that were properly made under a case-by-case determination (53 FR 30007).

Prior to the August 1988 policy, EPA listed RCRA sites as "unwilling" after a detailed case-by-case review that required considerable time and resources, and generated long support documents. To simplify the process and make it easier to understand, the Agency laid out objective criteria that would be simple to apply (53 FR 30005, August 9, 1988). In doing so, the Agency was not suggesting that prior determinations were somehow insufficient or incorrect; indeed, EPA believes that its case-by-case determinations were appropriate, and fully in line with the goals of the NPL/RCRA policy. Rather, the new criteria reflect an effort to replace the flexible and case-specific requirements of the past with more standardized documentation requirements in the future; the substantive goals of the policy are not changed. Thus, the issuance of the new standardized criteria for the future did not warrant a reassessment of sites already proposed for the NPL based on thorough, past unwillingness determinations.

The Agency chose to apply the new criteria prospectively to give EPA Regions and States enough lead time to understand the new requirements and prepare appropriate listing packages. For instance, the Regions or States may issue a specific RCRA corrective action order to demonstrate unwillingness even if other indicators of unwillingness are available. Applying the new criteria to already-proposed sites might require issuing additional orders fruitlessly if the owner/operator has already shown unwillingness, and listing would be significantly delayed, contrary to Congressional intent that EPA expeditiously list sites.

In any event, listing does not mean that remedial action will be taken; it only makes the site eligible for Fund-financed remedial action, should that prove necessary. Thus, the significance of the listing decision is limited. As the U.S. Court of Appeals for the D.C. Circuit noted in *City of Stoughton, Wisconsin* v. *EPA*, "the NPL is simply a rough list of priorities, assembled quickly and inexpensively to comply with Congress' mandate for the Agency to take action straightaway." (858 F.2d 747, 751 (D.C. Cir. 1988)). It is both reasonable and appropriate for EPA to limit the resources it expends on the determination of which of its statutues—RCRA or CERCLA—should have primary responsibility for securing needed corrective action.

One commenter suggested that the unwillingness policy rewards recalcitrance under RCRA, since if the owner/operator ignores RCRA obligations, and the site is placed on the NPL, EPA will find PRPs and engage in cost recovery efforts. The unwilling owner/operator has fewer transactional and administrative costs and a smaller share of cleanup costs.

In response, the Agency believes it is not advantageous for owner/operators to ignore their RCRA obligations. If an owner/operator does not comply with RCRA regulations, the Agency can pursue both RCRA and CERCLA enforcement authorities. RCRA corrective action orders can contain penalties of up to $25,000 per day of noncompliance and can result in a suspension or revocation of the facility's permit or interim status. EPA can also use CERCLA section 106 authorities and subsequently recover any cost incurred. EPA does not believe the policy rewards recalcitrance; the policy is designed to provide a framework for most effectively addressing releases that may affect public health and the environment.

One commenter believes that sites where owner/operators show unwillingness to cooperate with State-issued cleanup orders, actions, or permit conditions should be listed.

EPA agrees. The Agency's stated policy is list RCRA sites where the owner/operator has been found to be unwilling to perform corrective action. The August 9, 1988 (53 FR 30005) policy statement includes certain objective criteria (for prospective application) for determining unwillingness by RCRA owner/operators. The policy generally defines unwillingness as noncompliance with corrective actions directed by a

State or Federal authority pursuant to a RCRA order or permit, an administrative or judicial order, or a consent decree.

VII. Disposition of Sites in Today's Final Rule

This final rule adds 23 sites to the final NPL; a list of these sites is at the end of this rule. This rule also drops 27 sites from the proposed NPL (Table 1). The June 24, 1988 notice addressed 39 of these sites, which were originally proposed in the following NPL updates:

- Update #1 (48 FR 40674, September 8, 1983)
- Update #2 (49 FR 40320, October 15, 1984)
- Update #3 (50 FR 14115, April 10, 1985)
- Update #4 (50 FR 37950, September 18, 1985)

The remaining 11 sites were proposed in NPL Update #7 (53 FR 23988, June 24, 1988) and Update #8 (54 FR 19526, May 5, 1989), based on the NPL/RCRA policy. Nine of the proposed Update #7 sites received no comments and are being listed; one of the proposed Update #7 sites is being dropped because it is no longer bankrupt and therefore, no longer meets the criteria for listing under the NPL/RCA policy. One of the Update #8 sites received no comments and is being listed. EPA has not reached a decision on four other sites that were proposed to be dropped from the NPL on June 24, 1988. These sites will remain proposed for the NPL. They are:

- Fairchild Semiconductor Corp., (Mountain View Plant), Mountain View, CA
- Chemplex Co., Clinton/Camanche, IA
- Findett Corp., St. Charles, MO
- Burlington Northern Railroad (Somers Tie-Treating Plant), Somers, MT

All comments submitted after the close of the comment periods associated with the rules proposing these sites were considered for this final rule. EPA has revised the HRS scores for 5 sites based on its review of comments and additional information developed by EPA and the States (Table 2). None of the score changes has resulted in scores below the cut-off of 28.5. Some of the changes have placed the sites in different groups of 50 sites. The Agency's response to site-specific public comments and explanations of any score changes made as a result of such comments are addressed in the "Support Document for the Revised National Priorities List—Final Rule Covering Sites Subject to the Subtitle C Corrective Action Authorities of the Resource Conservation and Recovery Act, October, 1989."

TABLE 1.—RCRA SITES DROPPED FROM PROPOSED NPL

State/Site name	Location	Date proposed
CA: FMC Corp. (Fresno Plant)	Fresno	10/15/84
CA: Hewlett-Packard	Palo Alto	10/15/84
CA: IBM Corp, (San Jose Plant)	San Jose	10/15/84
CA: Kaiser Steel Corp. (Fontana Plant)	Fontana	06/24/88
CA: Marley Cooling Tower Co	Stockton	10/15/84
CA: Rhone-Poulenc, Inc./Zoecon Corp	East Palo Alto	10/15/84
CA: Signetics, Inc	Sunnyvale	10/15/84
CA: Southern Pacific Transportation Co	Roseville	10/15/84
CA: Van Waters & Rogers Inc	San Jose	10/15/84
CO: Martin Marietta (Denver Aerospace)	Waterton	09/18/85
FL: Pratt & Whitney Aircraft/United Technologies Corp	West Palm Beach	09/18/85
GA: Olin Corp. (Areas 1, 2 & 4)	Augusta	09/08/83
IA: A.Y. McDonald Industries, Inc	Dubuque	09/18/85
IA: Frit Industries (Humboldt Plant)	Humboldt	04/10/85
IA: John Deere (Dubuque Works)	Dubuque	09/18/85
IA: U.S. Nameplate Co	Mount Vernon	10/15/84
IL: Sheffield (U.S. Ecology, Inc.)	Sheffield	10/15/84
IN: Firestone Industrial Products Co	Noblesville	09/18/85
KS: National Industrial Environmental Services	Furley	10/15/84
MI: Hooker (Montague Plant)	Montague	09/18/85
MI: Lacks Industries, Inc	Grand Rapids	10/15/84
NE: Monroe Auto Equipment Co	Cozad	09/18/85
NJ: Matlack, Inc	Woolwich Township	09/18/85
OH: General Electric Co. (Coshocton Plant)	Coshocton	10/15/84
PA: Rohm & Haas Co. Landfill	Bristol Township	04/10/85
VA: IBM Corp. (Manassas Plant Spill)	Manassas	10/15/84
WV: Mobay Chemical Corp. (New Martinsville Plant)	New Martinsville	10/15/84

TABLE 2.—SITES WITH HRS SCORE CHANGES

State/Site name	City/County	Proposed	Final
CA: Fairchild Semiconductor (South San Jose)	San Jose	37.79	44.46
IN: Prestolite Battery Division	Vincennes	37.54	40.63
ME: Union Chemical Co., Inc	South Hope	30.78	32.11
MO: Conservation Chemical Co	Kansas City	29.99	29.85
NC: National Starch & Chemical Corp	Salisbury	31.94	46.51

VIII. Disposition of all Proposed Sites/ Federal Facility Sites

To date, EPA has proposed nine major updates to the NPL, as well as a special update of two sites. A total of 213 sites remain proposed (Table 3). At this time, 150 sites and 63 Federal facility sites continue to be proposed pending completion of response to comments, resolution of technical issues, and various policy issues.

All sites that remain proposed will be considered for future final rules. Although EPA has in the past considered late comments on proposed sites to the extent practicable, it may not be able to do so in the future.

TABLE 3.—NPL PROPOSALS

Update No.	Date/Federal Register Citation	Number of sites/Federal facility sites	
		Proposed	Remaining proposed
1	9/8/83; 48 FR 40674	132/1	1/0
2	10/15/84; 49 FR 40320	208/36	17/3
3	4/10/85; 50 FR 14115	26/6	0/1
4	9/18/85; 50 FR 37950	38/3	1/2
5	6/10/86; 51 FR 21099	43/2	8/0
6	1/22/87; 52 FR 2492	63/1	13/0
7	6/24/88; 53 FR 23988	215/14	103/5
8	5/5/89; 54 FR 19526	10/0	5/0
9	7/14/89; 54 FR 29820	0/52	0/52
ATSDR	8/16/89; 54 FR 33846	2/0	2/0
Total		735/115	150/63

IX. Contents of the NPL

The NPL, with the Federal facility sites in a separate section, appears as Appendix B to the NCP at the end of the other final rule appearing in today's **Federal Register.** Sites on the NPL are arranged according to their HRS scores. The 23 new sites added to the NPL in today's rule have been incorporated into the NPL in order of their HRS scores, except where EPA modified the order to reflect top priorities designated by the States, as discussed in section III of this rule.

The NPL is presented in groups of 50 sites to emphasize that minor differences in HRS scores do not necessarily represent significantly different levels of risk. Except for the first group, the score range within the groups, as indicated in the list, is less than 4 points. EPA considers the sites within a group to have approximately the same priority for response actions. For convenience, the sites are numbered.

One site—the Lansdowne Radiation site in Lansdowne, PA—was placed on the NPL because it met the requirements of the NCP at section 300.66(b)(4), as explained in section III of this rule; it has an HRS score of less than 28.50, and appears at the end of the list.

Each entry on the new NPL and Federal section contains the name of the facility and the State and city or county in which it is located. In the past, each entry was accompanied by one or more notations reflecting the status of response and cleanup activities at the site at the time this list was prepared. EPA is developing a report summarizing response activities at NPL sites. In the interim, information on activities at the new proposed sites is available upon request to the appropriate Regional Office.

X. Regulatory Impact Analysis

The costs of cleanup actions that may be taken at sites are not directly attributable to placement on the NPL, as explained below. Therefore, the Agency has determined that this rulemaking is not a "major" regulation under Executive Order 12291. EPA has conducted a preliminary analysis of economic implications of today's amendment to the NCP. EPA believes that the kinds of economic effects associated with this revision are generally similar to those effects identified in the following: the regulatory impact analysis (RIA) prepared in 1982 for the revisions to the NCP, the economic analysis prepared when amendments to the NCP were proposed (50 FR 5882, February 12, 1985), and the economic analysis prepared for the NCP proposed revisions of December 21, 1988 (53 FR 51471). The Agency believes the anticipated economic effects related to adding 23 sites to the NPL can be characterized in terms of the conclusions of the earlier RIA and the most recent economic analysis. This rule was submitted to the Office of Management and Budget for review as requested by Executive Order 12291.

Costs

EPA has determined that this rulemaking is not a "major" regulation under Executive Order 12291 because inclusion of a site on the NPL does not itself impose any costs. It does not establish that EPA will necessarily undertake remedial action, nor does it require any section by a private party or determine its liability for site response costs. Costs that arise out of site responses result from site-by-site decisions about what actions to take, not directly from the act of listing itself. Nonetheless, it is useful to consider the costs associated with responding to all sites included in this rulemaking.

The major events that follow the proposed listing of a site on the NPL are a search for potentially responsible parties and a remedial investigation/feasibility study (RI/FS) to determine if remedial actions will be undertaken at a site. Design and construction of the selected remedial alternative follow completion of the RI/FS, and operation and maintenance (O&M) activities may continue after construction has been completed.

EPA initially bears costs associated with responsible party searches. Responsible parties may bear some or all the costs of the RI/FS, remedial design and construction, and O&M, or EPA and the States may share costs.

The State cost share for site cleanup activities has been amended by section 104 of SARA. For privately-owned sites, as well as at publicly-owned but not publicly-operated sites, EPA will pay for 100% of the costs of the RI/FS and remedial planning, and 90% of the costs associated with remedial action. The State will be responsible for 10% of the remedial action. For publicly-operated sites, the State cost share is at least 50% of all response costs at the site, including the RI/FS and remedial design and construction of the remedial of the remedial action selected. After the remedy is built, costs fall into two categories:

- For restoration of ground water and surface water, EPA will share in startup costs according to the criteria in the previous paragraph for 10 years or until a sufficient level of protectiveness is achieved before the end of 10 years.
- For other cleanups, EPA will share for up to 1 year the cost of that portion of response needed to assure that a remedy is operational and functional. After that, the State assumes full responsibilities for O&M.

In previous NPL rulemakings, the Agency estimated the costs associated with these activities (RI/FS, remedial design, remedial action, and O&M) on an average per site and total cost basis. EPA will continue with this approach, using the most recent (1988) cost estimates available; these estimates are presented below. However, there is

wide variation in costs for individual sites, depending on the amount, type, and extend of contamination. Additionally, EPA is unable to predict what portions of the total costs responsible parties will bear, since the distribution of costs depends on the extent of voluntary and negotiated response and the success of any cost-recovery actions.

Cost category	Average total cost per site [a]
RI/FS	1,100,000
Remedial design	750,000
Remedial action	[b] 13,500,000
Net present value of O&M [c]	3,770,000

[a] 1988 U.S. dollars.
[b] Includes State cost-share.
[c] Assumes cost of O&M over 30 years, $400,000 for the first year and 10% discount rate.
Source: Office of Program Management, Office of Emergency and Remedial Response, U.S. EPA.

Costs to States associated with today's final rule arise from the required State cost-share of: (1) 10% of remedial actions and 10% of first-year O&M costs to privately-owned sites and sites which are publicly-owned but not publicly-operated; and (2) at least 50% of the remedial planning (RI/FS and remedial design), remedial action, and first-year O&M costs at publicly-operated sites. States will assume the cost for O&M after EPA's period for participation. Using the assumptions developed in the 1982 RIA for the NCP, EPA has assumed that 90% of the sites added to the NPL in this rule will be privately-owned and 10% will be State- or locally-operated. Therefore, using the budget projections presented above, the cost to States of undertaking Federal remedial planning and actions, but excluding O&M costs, would be approximately $59 million. State O&M costs cannot be accurately determined because EPA, as noted above, will share O&M costs for up to 10 years for restoration of ground water and surface water, and it is not known how many sites will require this treatment and for how long. However, based on past experience, EPA believes a reasonable estimate is that it will share startup costs for up to 10 years at 25 percent of sites. Using this estimate, State O&M costs would be approximately $66 million.

Placing a hazardous waste site on the final NPL does not itself cause firms responsible for the site to bear costs. Nonetheless, a listing may induce firms to clean up the sites voluntarily, or it may act as a potential trigger for subsequent enforcement or cost-recovery actions. Such actions may impose costs on firms, but the decisions to take such actions are discretionary and made on a case-by-case basis. Consequently, precise estimates of these effects cannot be made. EPA does not believe that every site will be cleaned up by a responsible party. EPA cannot project at this time which firms or industry sectors will bear specific portions of the response costs, but the Agency considers: the volume and nature of the waste at the sites; the strength of the evidence linking the wastes at the site to the parties; the parties' ability to pay; and other factors when deciding whether and how to proceed against the parties.

Economy-wide effects of this amendment are aggregations of effects on firms and State and local governments. Although effects could be felt by some individual firms and States, the total impact of this revision on output, prices, and employment is expected to be negligible at the national level.

Benefits

The real benefits associated with today's amendment placing additional sites on the NPL are increased health and environmental protection as a result of increased public awareness of potential hazards. In addition to the potential for more Federally-financed remedial actions, expansion of the NPL could accelerate privately-financed, voluntary cleanup efforts. Listing sites as national priority targets may also give States increased support for funding responses at particular sites.

As a result of the additional CERCLA remedies, there will be lower exposure to high-risk chemicals, and higher-quality surface water, ground water, soil, and air. These benefits are expected to be significant, although difficult to estimate in advance of completing the RI/FS at these sites.

XI. Regulatory Flexibility Act Analysis

The Regulatory Flexibility Act of 1980 requires EPA to review the impact of this action on small entities or certify that the action will not have a significant impact on a substantial number of small entities. By small entities, the Act refers to small businesses, small government jurisdictions, and nonprofit organizations.

While modifications to the NPL are considered revisions to the NCP, they are not typical regulatory changes since the revisions do not automatically impose costs. The placing of sites on the NPL does not in itself require any action of any private party, nor does it determine the liability of any party for the cost of cleanup at the site. Further, no identifiable groups are affected as a whole. As a consequence, it is hard to predict impacts on any group. Placing a site on the NPL could increase the likelihood that adverse impacts to responsible parties (in the form of cleanup costs) will occur, but EPA cannot identify the potentially affected business at this time nor estimate the number of small businesses that might be affected.

The Agency does expect that certain industries and firms within industries that have caused a proportionately high percentage of waste site problems could be significantly affected by CERCLA actions. However, EPA does not expect the impact from the listing of these 23 sites to have a significant economic impact on a substantial number of small businesses.

In any case, economic impacts would only occur through enforcement and cost-recovery actions, which are taken at EPA's discretion on a site-by-site basis. EPA considers many factors when determining what enforcement actions to take, including not only the firm's contribution to the problem, but also the firm's ability to pay.

The impacts (from cost recovery) on small governments and nonprofit organizations would be determined on a similar case-by-case basis.

List of Subjects in 40 CFR Part 300

Air pollution control, Chemicals, Hazardous materials, Intergovernmental relations, Natural resources, Oil pollution, Reporting and recordkeeping requirements, Superfund, Waste treatment and disposal, Water pollution control, Water supply.

Dated: September 26, 1989.

Jonathan Z. Cannon,

Acting Assistant Administrator, Office of Solid Waste & Emergency Response.

PART 300—[AMENDED]

40 CFR part 300 is amended as follows:

1. The authority citation for part 300 continues to read as follows:

Authority: 42 U.S.C. 9605; 42 U.S.C. 9620; 33 U.S.C. 1321(c)(2); E.O. 11735 (38 FR 21243); E.O. 12580 (52 FR 2923).

2. Appendix B of part 300 is amended by the addition of the sites in the following list. Appendix B is revised elsewhere in today's Federal Register.

NATIONAL PRIORITIES LIST, NEW FINAL SITES (BY RANK), OCTOBER 1989

NPL Group [1]	NPL Rank	State	Site Name	City/County
2	60	NJ	Brook Industrial Park	Bound Brook
3	138	CA	Brown & Bryant, Inc. (Arvin Plant)	Arvin
5	224	NE	Lindsay Manufacturing Co	Lindsay
6	257	NC	National Starch & Chemical Corp	Salisbury
6	278	VA	Culpeper Wood Preservers, Inc	Culpeper
7	310	CA	Fairchild Semiconducts (S. San Jose)	South San Jose
7	315	NY	Tri-Cities Barrel Co., Inc	Port Crane
8	385	IA	Electro-Coatings, Inc	Cedar Rapids
9	420	AZ	Motorola, Inc. (52nd Street Plant)	Phoenix
9	424	VA	Buckingham County Landfill	Buckingham
9	429	IN	Prestolite Battery Division	Vincennes
13	639	CA	J.H. Baxter & Co	Weed
14 *	661	IL	Ilada Energy Co	East Cape Girardeau
14	664	TX	Dixie Oil Processors, Inc	Friendswood
14	678	MI	Kysor Industrial Corp	Cadillac
14	679	CA	Lorentz Barrel & Drum Co	San Jose
16	760	ME	Union Chemical Co., Inc	South Hope
16	765	PA	Recticon/Allied Steel Corp	East Coventry Twp
16	772	FL	City Industries, Inc	Orlando
16	796	NC	Benfield Industries, Inc	Hazelwood
17	850	WA	American Crossarm & Conduit Co	Chehalis
18	861	GA	Marzone Inc./Chevron Chemical Co	Tifton
18	876	MO	Conservation Chemical Co	Kansas City

* State top priority site.
[1] Sites are placed in groups corresponding to groups of 50 on the final NPL.
Number of New Final Sites: 23.

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 300

[FRL 3655-6]

National Priorities List for Uncontrolled Hazardous Waste Sites—Final Rule 10/04/89

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency ("EPA") is amending the National Oil and Hazardous Substances Pollution Contingency Plan ("NCP"), 40 CFR Part 300, which was promulgated on July 16, 1982, pursuant to section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"). CERCLA has since been amended by the Superfund Amendments and Reauthorization Act of 1986 ("SARA") and is implemented by Executive Order 12580 (52 FR 2923, January 29, 1987). CERCLA requires that the NCP include a list of national priorities among the known releases or threatened releases of hazardous substances, pollutants, or contaminants throughout the United States, and that the list be revised at least annually. The National Priorities List ("NPL"), initially promulgated as Appendix B of the NCP on September 8, 1983 (48 FR 40658), constitutes this list and is being revised today by the addition of 70 sites, including 11 Federal facility sites. Based on a review of public comments on these sites, EPA has decided that they meet the eligibility requirements of the NPL and are consistent with the Agency's listing policies. In addition, today's action removes four sites from the proposed NPL. Information supporting these actions is contained in the Superfund Public Dockets.

Elsewhere in this **Federal Register** is another final rule that adds 23 sites to the NPL that meet EPA's eligibility requirements and listing policies and removes 27 sites from the proposed NPL that do not, at this time, appear to come within the categories of Resource Conservation and Recovery Act ("RCRA") facilities that EPA considers appropriate for the NPL.

These two rules result in a final NPL of 981 sites, 52 of them in the Federal section; 213 sites are proposed to the NPL, 63 of them in the Federal section. Final and proposed sites now total 1,194.

EFFECTIVE DATE: The effective date for this amendment to the NCP shall be November 3, 1989. CERCLA section 305 provides for a legislative veto of regulations promulgated under CERCLA. Although *INS* v. *Chadha* 462 U.S. 919, 103 S. Ct. 2764 (1983), cast the validity of the legislative veto into question, EPA has transmitted a copy of this regulation to the Secretary of the Senate and the Clerk of the House of Representatives. If any action by Congress calls the effective date of this regulation into question, the Agency will publish a notice of clarification in the **Federal Register.**

ADDRESSES: Addresses for the Headquarters and Regional dockets follow. For further details on what these dockets contain, see Section I of the "Supplementary Information" portion of this preamble.

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U.S. EPA, Region 2, Document Control Center, Superfund Docket, 26 Federal Plaza, 7th Floor, Room 740, New York, NY 10278, Latchmin Serrano, 212/264-5540, Ophelia Brown, 212/264-1154

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